IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID MOELLER, Respondent, v. FARMERS INSURANCE COMPANY OF WASHINGTON and FARMERS INSURANCE EXCHANGE, Petitioners.	No. 84500-0 STATEMENT OF ADDITIONAL AUTHORITIES

Pursuant to RAP 10.8, Petitioners Farmers Insurance Company of Washington and Farmers Insurance Exchange respectfully call the Court's attention to a recent decision of the United States District Court for the Western District of Washington, *Franklin v. Gov't Emps. Ins. Co.*, No. C10-5183BHS, 2011 U.S. Dist. LEXIS 125625 (W.D. Wash. Oct. 31, 2011).

The authority is offered in support of Petitioners' challenge to the trial court's certification of a Rule 23(b)(3) class. *See* Petitioner's Supplemental Brief at 14-20.

Petitioners also respectfully call the Court's attention to a recent update to Appleman's treatise on insurance law. *See* J. Randolph Evans et al., *Insurance Coverage for Post-Repair Diminution in Value: Trends in Automobile and Real Property Claims,* New Appleman on Insurance: Current Critical Issues in Insurance Law (Summer 2011) (copy attached). The authority is offered in support of Petitioners' argument that Farmers is not contractually obligated to repair first-party insureds' vehicles and pay diminished value claims, *see* Petitioners' Supplemental Brief at 1-14, and in response to the Appleman's statement cited by Moeller, *see* Amended Brief of Appellant at 28.

DATED this 28th day of November, 2011.

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New Appleman on Insurance: Current Critical Issues in Insurance Law

Summer 2011: Advice of Counsel--Diminution--Antitrust
Insurance Coverage for Post-Repair Diminution in Value: Trends in Automobile and Real Property Claims (With Multi-State Chart of Pertinent Court Decisions)

Aug2011-58 Appleman: Current Critical Issues in Insurance Law II

AUTHOR: by J. Randolph Evans, J. Stephen Berry and Letoyia Brooks

II. THE SPLIT AMONG JURISDICTIONS ON POST-REPAIR DIMINUTION IN VALUE AS IT RELATES TO AUTOMOBILE INSURANCE LIABILITY POLICIES

A. Overview

In automobile insurances cases, the following is an example of the typical policy language at issue:

> **Coverage Agreement**
>
> "We will pay for direct and accidental loss to 'your covered auto' or any 'non-owned auto,' including their equipment, minus any applicable deductible shown in the Declarations." n1
>
> * * *
>
> **Limit of Liability:**
>
> Our limit of liability for loss will be the lesser of the:
>
> 1. Actual cash value of the stolen or damaged property; or
>
> 2. Amount necessary to repair or replace the property with other of like kind and quality; or
>
> 3. Amount stated in the Declarations of this policy. n2
>
> * * *
>
> **Payment of Loss (Settlement of Loss):**
>
> "[W]e will pay for loss in money or repair or replace the damaged or stolen property." n3

The majority of jurisdictions have concluded that the foregoing clauses only entitle the insured to recover the cost of repair, but not the cost of repairs plus diminution in value. n4 Specifically, these courts advocate that while the coverage clause may permit the award of both the cost of repairs and diminution in value, the limit of liability and payment of loss clauses operate to limit the insurer's liability to the cost of repairs only when the insurer elects to repair.

Nonetheless, some courts have determined that (1) the insurer is required to "repair" the vehicle to both its pre-loss condition and "value," and as such the policy includes coverage for diminution in value in addition to repair costs; and/or (2) the foregoing policy language is ambiguous and, therefore, the policy should be construed in favor of the

insured. n5 One court has even determined that the insurer's primary obligation under an automobile insurance contract is to make the insured whole, which is a concept generally applied to tort cases as opposed to contractual claims. n6 Another court has awarded diminution in value drawing a distinction between stigma damages and losses due to diminution in value. n7

B. The Majority View: Automobile Liability Insurance Policies Do Not Permit Coverage for Post-Repair Diminution in Value

1. The Majority's Interpretation of the Coverage, Limitation of Liability, and Payment of Loss Provisions

Some insureds seeking diminution in value in addition to repair costs have filed class actions for breach of insurance contract asserting that the standard automobile liability policy covers both diminution in value and repair costs. In response, insurers often point to the Payment of Loss and Limits of Liability provisions asserting that the policy must be read as a whole and these provisions serve to limit the coverage clauses. The majority of courts have adopted the insurer's perspective, often focusing on the interpretation of the word "repair" and/or the phrase "of like kind and quality" in the limit of liability clause in the policy.

The Illinois Court of Appeals' decision in *Sims v. Allstate Insurance Company* n8 provides a classic illustration of the majority's view. The insureds in *Sims* filed a class action suit asserting that the insurer breached the insurance contract, when it failed to compensate the insureds for the diminished market value of their vehicles in addition to the repair costs the insurer paid following an automobile collision. Specifically, relying on the coverage provisions n9 of the policy, the insureds contended that the diminished market value of an adequately repaired vehicle is a "direct and accidental loss" that the insurer is required to compensate under the policy's insuring provision. The insurer, however, refused to pay for the diminution in value in addition to the repairs based on the following provisions contained in its automobile policies:

> **Payment of Loss by Allstate**
>
> ALLSTATE may pay for the loss in money, or may repair or replace the damaged or stolen property.
>
> * * *
>
> **Limits of Liability**
>
> ALLSTATE'S limit of liability is the actual cash value of the property or damaged part of the property at the time of loss. The actual cash value will be reduced by the deductible for each coverage as shown on the declarations page. However, OUR liability will not exceed what it would cost to repair or replace the property or part with other of like kind and quality. n10

Agreeing with the insurer, the court explained that, "[w]hile a vehicle's diminished value may be a 'loss' under the policy's insuring provisions, ... [the insurer's] obligation to compensate the insured for that loss is circumscribed by the plain language of the policy's "Limits of Liability" and the "Payment of Loss" sections." n11 The court determined that the plain and ordinary meaning of "repair" and "replace" connote the remediation of tangible, physical damage. n12 Thus, the court concluded that by definition the terms "repair" and "replace" mean "to restore something to its former condition, not to its former value." n13

The *Sims* court also pointed out that the limits of liability provision demonstrated that the insurance policy distinguished between the concept of value and the concept of repair as it offers distinct and separate options. n14 Specifically, the limit of liability clause gives an insurer the option to pay the actual cash value of the property or part at the time of the loss *or* to pay the cost to repair the property or to replace the property or part with one of like kind and quality. n15

The majority of jurisdictions agree with this interpretation of the limits of liability provision explaining that: "To hold [the insurer] liable for the automobile's cash value in virtually all cases would render essentially meaningless its clear right to elect to repair rather than to apply the actual cash value of the vehicle at the time of loss." n16 In essence, under the majority view, the concept of value is captured in the "actual cash value" option, which is distinct and separate from the insurer's option to "repair" or "replace" the vehicle.

Insureds have attempted to overcome the notion that a limits of liability clause limits the coverage provision and, therefore, does not contemplate the concept of value when an insurer elects to repair the vehicle. Insureds highlight the phrase "of like kind and quality." According to the insured, "of like kind and quality" not only requires restoration of the vehicle to the same condition/function/utility, but it also includes restoring the vehicle to the same value. Insureds define "quality" to include the concept of value.

But, the majority of jurisdictions have rejected this contention as well. For instance, the court in *American Manufacturers Mutual Insurance Company v. Schaefer* n17 rejected the insured's contention that the word "quality" encompasses the concept of value. n18 The court reasoned that, assuming that the word "quality" modifies both "repair" and "replace," the ordinary meaning of the words still must be examined. n19 Repair and replace with regard to a vehicle connote something tangible, like removing dents, fixing parts, or replacing the vehicle with a comparable substitute. n20 The court further reasoned that to interpret the policy's "repair or replace" language to include "diminished value" would render other provisions of the policy meaningless including the "lesser of" language in the limits of liability provision and the "payment of loss" section n21 of the policy. n22

Analyzing "like kind and quality" language contained in the limit of liability provision, the court in *Lupo v. Shelter Mutual Insurance Company* n23 similarly concluded the insurer is required to restore the damaged automobile to good, sound condition with parts and workmanship of the same essential quality or character that existed on the automobile prior to the accident. n24 "There is no concept of 'value' in the ordinary meaning of the word repair." n25 To permit diminution in value under the policy would make the insurer liable for an automobile's cash value in all instances. n26 Such an outcome would render meaningless its expressed right under the limits of liability provision to elect to repair or replace rather than to pay the actual cash value of the automobile at the time of the loss. n27

Courts espousing the majority view essentially interpret the limits of liability and/or payment of loss sections of an automobile liability policy to limit collision coverage to the lesser of the actual cash value of the automobile or the cost to repair to like kind and quality at the time of loss. n28 Under the majority perspective, "like kind and quality" means "substantially the same condition" function or utility and, therefore, it is not the equivalent of "actual cash value" at the time of loss. n29

2. The Ambiguity Argument Under the Majority View

Arguing in the alternative, insureds generally argue that various terms (*e.g.*, "loss," "repair" or "like kind and quality") contained in the coverage agreement and/or the limit of liability clauses of the automobile insurance contract are ambiguous. Other insureds have argued that the policy is ambiguous because it does not specifically exclude diminished market value. Therefore, relying on the general principle that an ambiguous policy should be interpreted in favor of the insureds as the insurer is generally the arbiter of the policy, the insured posits that the court must find that the policy includes coverage for diminution in value. n30 The majority of jurisdictions, however, reject the insured's contention that the policy is ambiguous. n31

The insureds in *Allgood*, for example, alternatively contended that the term "loss" as used in the Coverage n32 agreement is ambiguous because jurisdictions are split on whether the term "loss" includes diminution in value. n33 The insurer countered that the Limit of Liability n34 provision eliminates any claim for compensation for diminution in value irrespective of the meaning of "loss." n35 The court agreed with the insurer explaining that the insurer "promised to repair the vehicle or to replace it with property of like kind and quality, but there is no promise to restore the value of the vehicle." n36 Moreover, the court stated that while a disagreement among courts can be evidence of ambiguity, it does not establish conclusively that "loss" is ambiguous. n37

In rejecting a similar argument posited by insureds, the court in *O'Brien v. Progressive Northern Ins. Co.* n38 expressed it this way:

> The *Delledonne* court n39 ... incorrectly stated Delaware law by finding that the existence of two separate and distinct lines of authority in the interpretation of similar policy language is evidence of ambiguity. The duty of the courts is to examine solely the language of the contractual provisions in question to determine whether the disputed terms are capable of two or more reasonable interpretations. In so doing, Delaware courts are obligated to confine themselves to the language of the document and not to

> look to the extrinsic evidence to find ambiguity ... . This Court would place itself in an untenable position if it were to recognize every split in judicial authority as *prima facie* evidence of ambiguity. In the context of interpreting insurance agreements, an adoption of this policy would unduly restrict the power of the Delaware courts to render decisions independent of our sister courts. As discussed *supra*, absent exceptional circumstances, ambiguous terms in insurance contracts are interpreted in favor of the insured under the principle of *contra proferentem*. If this Court were to allow an insured to demonstrate ambiguity by providing evidence of a split in authority, *contra proferentem* would preclude us from even addressing the contract language or the merits of the case. n40

Of note, the *O'Brien* court also refused to consider any internal documents of the insurers or the fact that following the litigation one of the insurers altered its policy to exclude coverage for diminished value. n41 "The fact that [the insurer] chose to make a clear policy provision more clear as a remedial measure to this litigation may not be used as evidence of an admission of either ambiguity or acceptance of Appellants' interpretation of the policy." n42 The court determined that acceptance of Appellants' argument would discourage remedial action, which would be contrary to Delaware's public policy. n43

As distinct from contesting the meaning of the word "loss" as expressed in the coverage provision, the insured in *Siegle v. Progressive Consumers Insurance Company* n44 focused its ambiguity argument on the terms "repair", "replace", and "like kind and quality" contained in the limit of liability clause. n45 Specifically, the insured asserted that because the insurer failed to define "repair," "replace," or "like kind and quality," the policy was ambiguous, requiring the court to interpret the term "loss" to include diminished value. n46 The court, however, rejected the insured's contention. n47 Applying the ordinary and common definitions of the terms to the context of the insurance policy, the Florida Supreme Court explained that "repair" under the Limits of Liability provision "means to restore by replacing a part or putting together what is torn or broken." n48 Similarly, the term "replace" "was only intended to mean that the insurer would restore [the insured's automobile] to a former place or position or take the place of ... as a substitute or successor". n49 "Of like kind and quality" required the insurer to "place the insured in possession of a car the same or nearly the same as the damaged auto, in terms of the fundamental nature and degree of excellence of the automobile." n50 Therefore, the court concluded that the terms of the policy were unambiguous. n51

Hall v. Acadia Insurance Company n52 demonstrates another ambiguity argument that focuses on the terms in the limit of liability clause of the insurance contract. n53 On appeal, the insured's primary argument was that the second part of the limit of liability section ("Amount necessary to repair or replace the property") was ambiguous because "the policy equates the amount necessary to repair their car with the amount necessary to replace the car and that the amount necessary to replace the property most definitely refers to the value of the vehicle before the repairs were necessary." n54 The insurer rebutted that the policy unambiguously provided the insurer with an option to either compensate for the cost of repairs made to the vehicle or the cost of replacing the vehicle, but not both. n55

Siding with the insurer and the majority view, the court focused on the plain and ordinary meaning of "repair" determining that "repair" means to restore to sound condition after damage or injury. n56 The court explained that the nature of repairing the vehicle focuses on restoring it to its function and purpose, not value. n57 "The necessary cost of a repair is fairly understood to mean the amount that will be required to fix the car, not, in addition, the difference between the amounts a hypothetical willing and able buyer might pay to purchase the vehicle in its pre-accident condition versus its post-repair condition." n58 The court found the policy's terms to be concrete and unambiguous. n59 Thus, the court concluded that "[b]ecause diminution in value is a loss that cannot be repaired, an ordinary person would reasonably conclude that a claim for diminished value is not covered by the policy." n60

The analysis of the courts adopting the majority view turns primarily on their position that the common and ordinary meaning of the word "repair" does not include a concept of "value" irrespective of whether an insured advocates that the policy confers coverage for diminution in value in addition to repairs (1) directly through the coverage agreement (*i.e.*, generally a broad reading of the term "loss") and/or limit of liability section (*i.e.*, equating the phrase "of like kind and quality" to include value), or (2) indirectly by asserting that the policy is ambiguous. Further, these courts interpret the limit of liability clause to provide the insurer with a meaningful choice to pay for the cost of repairs or the diminished market value of the vehicle, but not both. The third major underpinning of the majority's reasoning is that the payment/valuation clause supports this construction of the limitation of liability clause. Thus, when the coverage agreement

is read in conjunction with the limitation of liability and payment clauses, the courts subscribing to the majority view conclude that the insurer is not obligated to pay for loss due to diminution in value in addition to the cost of repairs.

3. Other Arguments Insureds Have Asserted and the Majority Has Rejected

There are a few other arguments worth noting. First, some creative insureds have asserted the classic argument, "if it is not excluded, then it is covered." If the automobile policy does not explicitly exclude loss due to diminution in market value, then the policy must provide coverage for diminution in value. n61 Courts subscribing to the majority view have rejected this contention as well explaining that it is not necessary for an insurer to exclude a loss that the policy, when read as a whole, does not include such coverage in the first place. n62 In a more general sense, courts of almost all jurisdictions have ruled (in various words) that "the absence of an exclusion cannot confer coverage." n63

Second, some insureds have advocated that the coverage provision requires the insurer to make the insured "whole." While a few courts subscribing to the minority view have given this argument some traction, n64 the majority of jurisdictions have rejected it as a tort principle that is inapplicable to a contract case based on policy language. For instance, the insured in *Allgood v. Meridian Security Insurance Company* n65 argued that her insurer's agreement to indemnify her was an agreement to make her whole. n66 Specifically, the coverage agreement n67 by the insurer to pay for "direct and accidental loss" to their vehicles unambiguously included compensation for diminution in value. n68 The court, however, rejected the insured's contention reasoning that making a party whole is the province of tort law. n69 Consequently, the idea of making an insured whole has no application to the insured's claims, which stemmed entirely from the terms of an insurance contract. n70

Of note, some limitation of liability provisions use "lesser of," "lower of" or "shall not exceed." Some insureds have attempted to make a distinction of this difference in policy language, but to no avail. To illustrate, the limits of liability provision in *Davis v. Farmers Insurance Company of Arizona,* n71 stated that the insurer's "limit of liability for loss shall not exceed ... the amount which it would cost to repair or replace damaged or stolen property with other like kind and quality; or with new property less an adjustment for the physical deterioration and/or depreciation." n72 Addressing the insurer's contention that the limit of liability clause operated to cap the insurer's liability to the cost of repairs, the insured attempted to distinguish cases that limit the insurer's liability to the "lesser of" the available options as contrasted with Farmers' limit of liability clause language which uses the phrase "shall not exceed". n73 The insured in essence asserted that if a policy includes "lesser of" or "lower of" language, the insurer has a choice, but if the policy uses "shall not exceed" language, the insurer must pay the highest-cost alternative. n74 Finding the difference to be trivial, the court pointed out that there are a number of cases that have disallowed diminished market value where the policies contained the same or similar "will not exceed" language as the policy at issue. n75

C. The Minority View: The Automobile Insurance Policy Allows Diminution in Value in Addition to the Cost of Repairs

1. Courts That Construe the Automobile Policy to Include the Concept of "Value"

Despite the majority position, some courts have found coverage for repair costs in addition to lost value. Many of these ruled that the terms "loss," "repair," and "like kind and quality" encompass a loss for diminution in value, while other courts find that the terms are ambiguous.

While also concluding that "loss," "repair," and "like kind and quality" contemplate function as well as value, the Georgia Supreme Court takes its analysis one step further. Specifically, the Georgia Supreme Court held in *State Farm Mutual Automobile Insurance Company v. Mabry* n76 that the coverage clause is subordinate to the limitation of liability and loss payment clauses as "making the insured whole" is the insurer's primary obligation.

While agreeing that the insurer has an option to repair or replace the vehicle, courts subscribing to the minority view find that "of like kind and quality" connotes value. n77 The court in *Hyden v. Farmers Insurance Exchange* n78 for example, agreed that the insurer's loss payment provision stating that the insurer "will pay the loss in money or repair or replace" damaged property gave the insurer the option to repair or replace the vehicle. n79 Nonetheless, the court explained that once the insurer elects to repair the vehicle, then under the terms of the policy the insurer must provide plaintiff with a vehicle "of like kind and quality." n80

Although the insurer contended that the phrase "of like kind and quality" only obligated it to repair the vehicle to a point where it functioned as it did before the accident, the court disagreed. n81 Specifically, the court reasoned that "[a] vehicle is not restored to substantially the same condition if repairs leave the market value of the vehicle substantially less than the value immediately before the collision." n82 Expounding, the court reasoned that the term "quality" can convey a different meaning than "kind," and that "quality" often conveys a degree of excellence or a superiority in kind. n83 Because the words "kind" and "quality" joined together by "and" rather than by "or", the court stated that the insureds could reasonably expect the insurer "to provide them with vehicles substantially equivalent in both function and value to those which they drove prior to any accidents." n84

Although the Georgia Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Mabry* n85 shared the *Hyden's* court view that an automobile insurance policy includes the concept of value, Georgia applies a far more expansive reading of the automobile policy than any other court. Specifically, analyzing and relying on 75 years of Georgia precedence, the Georgia courts have a long-standing history of construing automobile insurance contracts to require the insurer to make the insured whole. n86 According to the *Mabry* court, making the insured whole is the overriding, primary obligation of the insurer under the automobile liability policy. n87

The *Mabry* court began its analysis with *U.S. Fidelity & Guaranty Company v. Corbett*, n88 which held that

> the undertaking of the company to insure the owner against "actual loss or damage" must be taken as the primary obligation, under which the measure of the liability would be the difference between the value of the property immediately before the injury and its value immediately afterwards [cit.]; and the stipulation that the liability should not exceed the cost of repair or replacement must be construed as a subordinate provision, limiting or abating the primary liability, to be pleaded defensively if the insurer would diminish or limit the amount of recovery by reason thereof. n89

The *Mabry* court then observed that the Georgia Court of Appeals further clarified the effect of the limitation of liability clause in *Simmons v. State Farm Mutual Automobile Insurance Company*. n90 Specifically, the *Simmons* court concluded that in auto claims, irrespective of whether the insurer opted to pay for the loss in money, to repair the vehicle, or to replace it with other property of like kind and quality; the market value post-loss must equal the market value pre-loss. n91

The *Mabry* court pointed out that the Georgia Court of Appeals continued to reiterate that, with regard to automobile policies, the measure of damages is based on value in *State Farm Mutual Automobile Insurance Company v. Smith*, n92 and *Georgia Farm Bureau Mutual Insurance Company v. Lane*. n93 In *Smith*, the Court of Appeals stated that, "if the insurer elects to repair it may do so, but to the extent that repairs do not restore to the market value immediately before the collision, the insurer is obligated to compensate for the difference, the total liability reduced by any deductible. The insured must be made whole ... ." n94 The *Lane* court also held that the diminished value should be added to the cost of repairs "so that the insured will be made whole." n95 Citing additional Georgia case law, the *Mabry* court concluded that Georgia case law clearly establishes that "value, not condition[,] is the baseline for the measure of damages in a claim under an automobile insurance policy in which the insurer undertakes to pay for the insured's loss from a covered event, and that a limitation of liability provision affording the insurer an option to repair serves only to abate, not eliminate, the insurer's liability for the difference between pre-loss value and post-loss value." n96

Although the insurer pointed out that the notion of "making the insured whole" is a tort measure of damage that is inappropriate to a case involving an insurance contract, the Mabry court explained that Georgia has consistently interpreted physical damage coverage of automobile insurance contracts to require that the insured be made whole, basing the measure of damages on the value of the vehicle. n97 "The rationale of those cases remains solid: the insurance policy, *drafted by the insurer*, promises to pay for the insured's loss; what is lost when physical damage occurs is both utility and value; therefore, the insurer's obligation to pay for the loss includes paying for any lost value." n98 Thus, Georgia's application of the common tort concept to "make the insured whole" appears to stem from, at least in part, the idea that the insurer is the arbiter of the policy.

2. Ambiguity Under the Minority View

Some courts also have found that certain policy language was ambiguous and, therefore, the policy must be construed in favor of coverage for the insured requiring the insurer to compensate the insured for any diminished value of the insured's repaired vehicle. n99 For instance, the *Hyden* court determined that the "phrase 'of like kind and quality' is ambiguous because it fails to specify the protections afforded by the policy." n100 As such, the court construed the phrase in favor of coverage for the insured. n101 "[W]e hold that when an automobile insurer promises to provide an insured with a vehicle 'of like kind and quality', the insurer must provide the insured, through repair, replacement, and/or compensation, the means of acquiring a vehicle substantially similar in function and value to that which the insured had prior to his or her accident." n102

Similarly, applying Rhode Island and Louisiana law, n103 the Superior Court of Rhode Island in *Cazabat v. Metropolitan Prop. & Cas. Ins. Co.* n104 determined that the phrase "the cost of repair or replace the property with other of like kind and quality" was ambiguous with respect to whether that provision included damages for the "inherent diminished value" of an automobile that has been repaired after a collision. n105 The court observed that the insurance policies at issue failed to define "repair," "cost of repair" or "like kind and quality" and failed to specifically include or exclude diminished value or loss in value. n106 The court also found it significant, although not dispositive, that there was a split of authority within and among various jurisdictions throughout the United States. n107 "Furthermore, the Louisiana Supreme Court and the [Louisiana] Court of Appeals have not addressed whether recovery for the diminished value of an automobile is applicable in a first party context, and there is a division in the lower courts as to whether the insurance policy language is ambiguous." n108 Thus, construing the policy in favor of the insured, the court held that the automobile policy included damages for inherent diminished value of an automobile post-repair. n109 Of note, at least two Louisiana courts disagreed with the *Cazabat* court's finding of ambiguity. n110

D. Distinguishing Stigma Damages from Loss Due to Diminution in Value

Some courts allowing the insured to recover for diminution in value in addition to repair costs do so drawing a distinction between stigma damages and diminution in value. The Washington Court of Appeals in *Moeller v. Farmers Insurance Company of Washington* n111 explained the difference between diminished value and stigma damages as follows:

> A vehicle suffers diminished value when it sustains physical damage in an accident, but due to the nature of the damage, it cannot be fully restored to its pre-loss condition. The remaining, irreparable physical damage, such as, for example, weakened metal which cannot be repaired and which results in diminished value. In contrast, stigma damages occur after the vehicle has been fully restored to its pre-loss condition, but it carries an intangible taint due to its having been involved in an accident. n112

The *Moeller* court concluded that the policy covered diminished value as direct losses including those proximately caused by the initial harm, but left open whether stigma damages are recoverable under an automobile insurance policy. n113

The court observed that the initial harm included damage that remained that could not be repaired (*e.g.*, weakened metal). n114 The court next determined whether the limits of liability clause n115 precluded recovery for diminished value. n116 Applying the ordinary meaning of the terms "like," "kind." and "quality," n117 the court found that it was a reasonable interpretation that after repair or replacement with like kind and quality, the vehicle's capacity and value post-loss should be similar to its capacity and value pre-loss. n118 This rejected the insurer's assertion that a reasonable interpretation of the limitation of liability clause suggests that the vehicle need only be restored to good condition with parts and workmanship of the same essential nature that existed on the vehicle prior to the accident. n119 "Even under [the insurer's] interpretation, the vehicle could not be restored to its pre-loss status because the nature of metal and stressed, but working, parts cannot be repaired." n120

Like *Moeller*, the Supreme Court of Oregon also made a similar distinction between stigma damages and damages due to diminution in value in *Gonzales v. Farmers Ins. Co. of Oregon*. n121 In the *Gonzales* case, the insured demonstrated that the insurer's repairs failed to restore the vehicle to its pre-accident condition. In a suit against the insurer, the insured contended that if the attempted repair could not restore the vehicle to its pre-accident condition, then defendants were responsible for the diminution of the value of the vehicle due to the accident. The insurer, on the other hand, as-

serted that the policy obligated the insurer to repair the vehicle, and the plain and ordinary meaning of the word "repair" in the policy did not incorporate a duty to pay diminished value. n122

Interestingly, the Supreme Court of Oregon focused its analysis on the meaning of the word "repair" as used in the policy and applied the same definition as those courts under the majority view. n123 Citing two previous Oregon cases interpreting similar automobile insurance policies (*Dunmire Co v. Or. Mut. Fire Ins. Co.* n124 and *Rossier v. Union Automobile Ins. Co.* n125), the *Gonzales* court held that " 'repair', as used in the policy at issue in this case, requires defendants to restore plaintiff's vehicle to its pre-loss physical condition." n126 Thus, "under the policy at issue, if an attempted 'repair' does not or cannot result in a complete restoration of the vehicle's pre-loss condition, the vehicle is not 'repair[ed],' and the resulting diminution of value of the vehicle remains a 'loss to [the] insured car caused by collision' for which defendants are liable under their policy." n127

In holding that the term "repair" requires the insurer to repair the vehicle to its pre-loss condition, the *Gonzales* decision is not necessarily contrary to the majority view. Other courts subscribing to the majority view have also expressly stated that an insurer may be in breach of the policy where it fails to pay diminution in value in circumstances where the vehicle cannot be repaired to its pre-loss condition. n128 In contexts where "repairs are incomplete or faulty, or when the insurer elects to repair when declaring a total loss is the better option", the *Schaefer* court noted that the insurer might be liable for breaching its obligations under the policy's terms. n129

Interestingly, the *Gonzales* court expressly left open the question of stigma damages. n130 Because the insured did not assert a claim for stigma and because the case involved a genuine dispute about whether the insurers had restored the vehicle to its pre-loss condition, n131 the court determined that "we need not decide whether the policy requires payment for a claim based solely on 'stigma.' " n132 Thus, arguably, Oregon courts may ultimately subscribe to the majority view.

FOOTNOTES:

(n1)Footnote 1. *Allgood v. Meridian Security Ins. Co., 836 N.E.2d 243, 246 (Ind. 2005)*.

(n2)Footnote 2. *American Manufacturers Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 156 (Tex. 2003)*.

(n3)Footnote 3. *Schaefer, 124 S.W.3d at 156*.

(n4)Footnote 4. *See, e.g., Allgood v. Meridian Security Ins. Co., 836 N.E.2d 243, 247 (Ind. 2005)* ; *Pritchett v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 785, 791 (Ala. Civ. App. 2002)* ; *O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 290 (Del. 2001)* ; *Stegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 736 (Fla. 2002)* ; *Campbell v. Markel Am. Ins. Co., 822 So. 2d 617, 627 (La. Ct. App. 2001)* ; *Hall v. Acadia Ins. Co., 801 A.2d 993, 995 (Me. 2002)* ; *Given v. Commerce Ins. Co., 796 N.E.2d 1275, 1280 (Mass. 2003)* ; *Lupo v. Shelter Mut. Ins. Co., 70 S.W.3d 16, 22 (Mo. Ct. App. 2002)* ; *Schulmeyer v. State Farm Fire & Cas. Co., 579 S.E.2d 132, 135 (S.C. 2003)* ; *Culhane v. W. Nat'l Mut. Ins. Co., 704 N.W.2d 287, 295 (S.D. 2005)* ; *American Manufacturers Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 158-159 (Tex. 2003)* ; *Davis v. Farmers Ins. Co. of Arizona, 142 P.3d 17, 21-22 (N.M. Ct. App. 2006)*.

(n5)Footnote 5. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Mabry, 556 S.E.2d 114 (Ga. 2001)* ; *Hyden v. Farmers Ins. Exchange, 20 P.3d 1222, 1225 (Colo. Ct. App. 2000)* ; *Venable v. Import Volkswagen, Inc., 519 P.2d 667 (Kan. 1974)*.

(n6)Footnote 6. *Mabry, 556 S.E.2d at 120-122* (permitting recovery for diminished market value citing 75 years of Georgia precedent that incorporates a value element into "repair" so "that the insured will be made whole" (internal quotation marks and citation omitted)).

(n7)Footnote 7. *Moeller v. Farmers Ins. Co. of Washington, 229 P.3d 857, 863 (Wash. Ct. App. 2010)*.

(n8)Footnote 8. *851 N.E.2d 701 (Ill. App. Ct. 2006)*.

(n9)Footnote 9. Allstate's collision and comprehensive coverage for an insured's automobile reads as follows:

> **COVERAGE DD** Auto Collision Insurance
>
> ALLSTATE will pay for direct and accident loss to YOUR insured AUTO * * * (including insured loss to an attached trailer from a collision with another object or by upset of that AUTO or trailer. * * *

* * *

COVERAGE HH Auto Comprehensive Insurance

ALL STATE will pay for direct and accidental loss to YOUR insured AUTO * * * not caused by collision.

Id. at 703 .

(n10)Footnote 10. *Id. at 703* .

(n11)Footnote 11. *Id. at 704* ; *see also Lupo v. Shelter Mut. Ins. Co., 70 S.W.3d 16, 22 (Mo. Ct. App. 2002)* (finding that the coverage provision of the policy may be broad enough to encompass diminished value, while the "limits of liability" and the "loss settlement" provisions operated to cap the insurer's liability).

(n12)Footnote 12. *Sims, 851 N.E.2d at 705* (citing Webster's Third New International Dictionary 1923 (1993) (" 'repair' means to restore by replacing a part or putting together what is torn or broken' ... 'replace' means to restore to a former place, position, or condition"); *see also American Manufacturers Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 158 (Tex. 2003)* ("repair" connotes something tangible, like removing dents or fixing parts).

(n13)Footnote 13. *Sims, 851 N.E.2d at 705*; *see also Allgood v. Meridian Security Ins. Co., 836 N.E.2d 243, 247, 248 (Ind. 2005)* (explaining that the insurer "promised to repair the vehicle or to replace it with property of like kind and quality, but there is no promise to restore the value of the vehicle" because "repair means to restore something to its former condition, not necessarily to its former value"); *Schaefer, 124 S.W.3d at 159* ("We do not believe that the ordinary or generally accepted meaning of the word 'repair' connotes compensating for the market's perception that a damaged but fully and adequately repaired vehicle has an intrinsic value less than that of a never-damaged car."); *Pritchett v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 785, 791 (Ala. Civ. App. 2002)* ("The various definitions of repair do not discuss the concept of value. We do not believe that in its common usage, the term 'repair' is understood to encompass the concept of value or require a restoration of value."); *Campbell v. Markel Am. Ins. Co., 822 So. 2d 617, 627 (La. Ct. App. 2001)* ("[T]he better view of the 'repair or replace' limitation is that it caps [the insurer's] liability at the cost of returning the damaged [vehicle] to substantially the same physical, mechanical, and cosmetic condition as existed before the loss. There is no concept of 'value' in the ordinary meaning of the word 'repair.' To ascribe to the words 'repair or replace' an obligation to compensate the insured for things that, by their very nature, cannot be 'repaired' or 'replaced' would violate the most fundamental rules of contract construction."); *Hall v. Acadia Ins. Co., 801 A.2d 993, 995 (Me. 2002)* ("The act of repairing an object typically focuses upon restoring the object's function and purpose, and not upon returning the object to its earlier worth or value."); *Given v. Commerce Ins. Co., 796 N.E.2d 1275, 1280 (Mass. 2003)* ("There is nothing exotic about the words 'repair or replace' as used in the standard policy--both words, in their ordinary usage, refer to the remedying of tangible, physical damage."); *Lupo v. Shelter Mut. Ins. Co., 70 S.W.3d 16, 22 (Mo. Ct. App. 2002)* ("There is no concept of 'value' in the ordinary meaning of the word repair."); *Schulmeyer v. State Farm Fire & Cas. Co., 579 S.E.2d 132, 135 (2003)* ("There is no concept of value in the ordinary meaning of" the words "repair" or " replace."); *Culhane v. W. Nat'l Mut. Ins. Co., 704 N.W.2d 287, 295 (S.D. 2005)* ("[T]he ordinary meaning of the words 'repair' and 'replace' indicate [sic] something physical and tangible.").

(n14)Footnote 14. *Sims, 851 N.E.2d at 706*; *see also Pritchett, 834 So. 2d at 792* (finding that because the policy uses the term "value" elsewhere, "it is clear that State Farm was aware of the concept of value and had used the term to define the limits of other areas of coverage it provided under the insurance policy").

(n15)Footnote 15. *Sims, 851 N.E.2d at 706* (emphasis added); *see also Lupo, 70 S.W.3d at 20* (construing the policy as a whole, the court concluded that the policy permitted the insurer to exercise one of three options to compensate the insured: "Shelter may pay the lesser of either the actual cash value or the cost to repair *or* replace the automobile when a loss occurs." (emphasis supplied; internal quotation marks omitted)).

(n16)Footnote 16. *Ray v. Farmers Ins. Exchange, 200 Cal. App. 3d 1411, 1416-1417 (1988)* (holding that the policy unambiguously gave the insurer the right to elect to repair the vehicle if the cost to repair to like kind and quality was less than the actual cash value of the vehicle at the time of loss); *see also American Manufacturers Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 160 (Tex. 2003)* ; *Schulmeyer v. State Farm Fire & Cas. Co., 579 S.E.2d 132, 135 (2003)* .

(n17)Footnote 17. *124 S.W.3d 154, 160 (Tex. 2003)* .

(n18)Footnote 18. The limit of liability provision in *Schaefer* stated as follows:

> Our limit of liability for loss will be the lesser of the:
>
> 1. Actual cash value of the stolen or damaged property; or
>
> 2. Amount necessary to repair or replace the property with other of like kind and quality; or
>
> 3. Amount stated in the Declarations of this policy.

Id. at 156 .

(n19)Footnote 19. *Id. at 160* .

(n20)Footnote 20. *Id.*

(n21)Footnote 21. The Payment of Loss provision in the policy provided that the insurer will "pay for loss in money or repair or replace the damaged or stolen property." *American Manufacturers Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 156 (Tex. 2003)* .

(n22)Footnote 22. *Id.*

(n23)Footnote 23. *70 S.W.3d 16 (Mo. Ct. App. 2002)* .

(n24)Footnote 24. *Id. at 22* .

(n25)Footnote 25. *Id.*

(n26)Footnote 26. *Id.*

(n27)Footnote 27. *Id.*; *see also Davis v. Farmers Ins. Co. of Arizona, 142 P.3d 17, 23 (N.M. Ct. App. 2006)* (observing that while the meanings of "like," "kind," and "quality," may include a value element, such element is lost when reading the policy as a whole).

(n28)Footnote 28. *Ray v. Farmers Ins. Exchange, 200 Cal. App. 3d 1411, 1417 (Cal. Ct. App. 1988)* ; *accord American Manufacturers Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 160 (Tex. 2003)* ; *Schulmeyer v. State Farm Fire & Cas. Co., 579 S.E.2d 132, 135 (2003)* .

(n29)Footnote 29. *Id.*

(n30)Footnote 30. *Id.*

(n31)Footnote 31. *See, e.g., Davis v. Farmers Ins. Co. of Arizona, 142 P.3d 17, 24 (N.M. Ct. App. 2006)* ; *Sims v. Allstate Ins. Co., 851 N.E.2d 701, 707 (Ill. App. Ct. 2006)* (finding no ambiguity in the terms of the policy and that the policy clearly precludes diminution in value post-repair); *Allgood v. Meridian Security Ins. Co., 836 N.E.2d 243, 247-248 (Ind. 2005)* (the phrase "repair or replace the property with other property of like kind and quality" is not ambiguous and does not allow the insured to recover for the repaired vehicle's diminished value); *Culhane v. W. Nat'l Mut. Ins. Co., 704 N.W.2d 287, 287 (S.D. 2005)* (an unambiguous policy requires the insurer to restore the vehicle to its pre-loss physical and operating condition, not to compensate for its loss of value); *Given v. Commerce Ins. Co., 796 N.E.2d 1275, 1275 (Mass. 2003)* (no objectively reasonable insured would conclude that "repair" or "replace" includes compensation for a diminution in market value or for anything else beyond the restoration of the vehicle's physical condition pre-loss); *American Manufacturers Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 159-160 (Tex. 2003)* (the phrase "repair or replace the property with other of like kind and quality" clearly requires the insurer to restore the vehicle to its pre-loss physical and operating condition, not its pre-loss value); *Hall v. Acadia Ins. Co., 801 A.2d 993 (Me. 2002)* (the unambiguous "repair" language of the policy precludes a recovery for a diminution in value, a loss that cannot be repaired); *Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 738-739 (Fla. 2002)* (the phrase "repair or replace the property with other of the like kind and quality" clearly limited the insurer's liability to a monetary amount necessary to repair the car's function and appearance, not value); *Camden v. State Farm Mut. Auto. Ins. Co., 66 S.W.3d 78, 82 (Mo. Ct. App. 2001)* (rejecting the insureds contention that the absence of an express exclusion for diminished value is relevant to finding coverage because the policy unambiguously does not obligate the insurer to pay diminished

value); *Ray v. Farmers Ins. Exchange, 200 Cal. App. 3d 1411, 1416 (1988)* (the policy language unambiguously required the insurer to restore the automobile to its pre-collision condition, but not to its pre-collision value).

(n32)Footnote 32. The Coverage Agreement stated, "We will pay for direct and accidental loss to 'your covered auto' or any 'non-owned auto,' including their equipment, minus any applicable deductible shown in the Declarations." *Allgood, 836 N.E.2d at 246* .

(n33)Footnote 33. *Id.*

(n34)Footnote 34. "Our limit of liability for loss will be the lesser of the: 1. Actual cash value of the stolen or damaged property; or 2. Amount necessary to repair or replace the property with other property of like kind and quality." *Id. at 246* .

(n35)Footnote 35. *Id. at 246-247* .

(n36)Footnote 36. *Id. at 247* . Similar to the other jurisdictions subscribing to the majority view, the *Allgood* court pointed to the common and ordinary meaning of "repair" and "replace." *Id.* "[R]epair means to restore something to its former condition; not necessarily to its former value." *Id.* Furthermore, "[d]iminution in value can be compensated, but it cannot be repaired or replaced." *Id. at 248* .

(n37)Footnote 37. *Id. at 248* .

(n38)Footnote 38. *785 A.2d 281 (Del. 2001)* .

(n39)Footnote 39. In *O'Brien*, the Delaware Supreme Court abrogated *Delledonne v. State Farm Mut. Auto. Ins. Co., 621 A.2d 350, 352 (Del. Super. Ct. 1992)* , wherein the Superior Court of Delaware awarded the insured diminution in value in addition to the cost of repairs for flood the damage to the insured's vehicle.

(n40)Footnote 40. *O'Brien, 785 A.2d at 289* .

(n41)Footnote 41. *Id.*

(n42)Footnote 42. *Id. at 290* .

(n43)Footnote 43. *Id.*

(n44)Footnote 44. *819 So.2d 732 (Fla. 2002)* .

(n45)Footnote 45. *Id. at 735* . Specifically, the Coverage provision in *Siegle* obligated the insurer to "pay for loss to your insured auto or its equipment caused by [collision] less any applicable deductibles for each separate loss." The payment of loss section provided that the insurer "may pay the loss in money or repair or replace damaged or stolen property with other of like kind and quality." "Loss" was defined in the policy as direct and accidental loss of or damage to your insured auto, including its equipment. Further, the insurer's limit of liability for loss "shall not exceed the lesser of: 1. the actual cash value of the stolen or damaged property ... 2. the amount necessary to repair or replace the property with other of the like kind and quality ... 3. the amount stated in the Declarations page of this policy." *Id. at 734* .

(n46)Footnote 46. *Id.*

(n47)Footnote 47. *Id. at 736* .

(n48)Footnote 48. *Id.* (omitting internal quotation marks) (citing Merriam-Webster's Collegiate Dictionary 991 (10th ed. 1999).

(n49)Footnote 49. *Id.* (omitting internal quotation marks) (citing Merriam-Webster's Collegiate Dictionary 991 (10th ed. 1999).

(n50)Footnote 50. *Id.*

(n51)Footnote 51. *Id.*

(n52)Footnote 52. *801 A.2d 993 (Me. 2002)* .

(n53)Footnote 53. The Limit of Liability provision provided, in pertinent part, that the insurer's liability is limited to the lesser of: "1. Actual cash value of the stolen or damaged property; or 2. Amount necessary to repair or replace the property." *Id. at 994-995* .

(n54)Footnote 54. *Id. at 995* .

(n55)Footnote 55. *Id.*

(n56)Footnote 56. *Id.*

(n57)Footnote 57. *Id.*

(n58)Footnote 58. *Id.*

(n59)Footnote 59. *Id.*

(n60)Footnote 60. *Id. at 996* .

(n61)Footnote 61. *See, e.g., Davis v. Farmers Ins. Co. of Arizona, 142 P.3d 17, 21 (N.M. Ct. App. 2006)* ; *American Manufacturers Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 160 (Tex. 2003)* ; *Camden v. State Farm Mut. Auto. Ins. Co., 66 S.W.3d 78, 82 (Mo. Ct. App. 2001)* .

(n62)Footnote 62. *Id.*

(n63)Footnote 63. *Schaefer, 124 S.W.3d at 160* ; *accord Camden, 66 S.W.3d at 82* (rejecting the insureds contention that the absence of an express exclusion for diminished value is relevant to finding coverage because the policy unambiguously does not obligate the insurer to pay diminished value).

(n64)Footnote 64. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Mabry, 556 S.E.2d 114 (Ga. 2001)* ; *State Farm Mut. Auto. Ins. Co. v. Smith, 167 S.E.2d 610 (Ga. Ct. App. 1969)* ; *Georgia Farm Bureau Mut. Ins. Co. v. Lane, 199 S.E.2d 273 (Ga. Ct. App. 1973)* .

(n65)Footnote 65. *836 N.E.2d 243 (Ind. 2005)* .

(n66)Footnote 66. *Id. at 245.*

(n67)Footnote 67. The Coverage Agreement stated, "We will pay for direct and accidental loss to 'your covered auto' or any 'non-owned auto,' including their equipment, minus any applicable deductible shown in the Declarations." *Id. at 246.*

(n68)Footnote 68. *Id.*

(n69)Footnote 69. *Id. at 246.*

(n70)Footnote 70. *Id. at 246*; *see also Schaefer, 124 S.W.3d at 161* (noting that a market-value differential award was a tort measure of damage and, therefore, inappropriate in a contractual case based on policy language).

(n71)Footnote 71. *142 P.3d 17 (N.M. Ct. App. 2006)* .

(n72)Footnote 72. *Id. at 21* .

(n73)Footnote 73. *Id. at 23* .

(n74)Footnote 74. *Id. at 24* .

(n75)Footnote 75. *Id.* (citing *Gen. Accident Fire & Life Assurance Corp. v. Judd, 400 S.W.2d 685, 686-687 (Ky. 1966)* (disallowing recovery of diminished market value where the plaintiff's policy stated that the insurer's liability would "not exceed the actual cash value ... nor what it would then cost to repair or replace the property"); *Given v. Commerce Ins. Co., 796 N.E.2d 1275, 1277 (Mass. 2003)* (disallowing recovery of diminished market value where the insurer's liability was limited to "never pay[ing] more than what it would cost to repair or replace the damaged property" (internal quotation marks omitted)); *Lupo v. Shelter Ins. Co., 70 S.W.3d 16, 19, 23 (Mo. Ct. App. 2002)* (same).

(n76)Footnote 76. *556 S.E.2d 114 (Ga. 2001)* .

(n77)Footnote 77. *E.g., Moeller v. Farmers Ins. Co. of Washington, 229 P.3d 857, 863 (Wash. Ct. App. 2010)* ; *State Farm Mut. Auto. Ins. Co. v. Mabry, 556 S.E.2d 114 (Ga. 2001)* ; *Hyden v. Farmers Ins. Exch., 20 P.3d 1222, 1225 (Colo. Ct. App. 2000)* ; *Venable v. Import Volkswagen, Inc., 519 P.2d 667 (Kan. 1974)* ("When an insurer makes an election to repair or rebuild under a 'repair, restore or replace clause' in its policy the insurer is then obligated to put the vehicle in substantially the same condition as it was prior to the collision so as to render it as *valuable* and as serviceable as before.") (emphasis added).

(n78)Footnote 78. *20 P.3d 1222 (Colo. Ct. App. 2000)*. The insured's vehicle was involved in a traffic accident. The insurer repaired the vehicle at a cost of $16,868.96. The insured entered evidence showing that the vehicle's value post-loss was no more than $7,500 as compared to its post-loss value of approximately $23,000. The insurer, in pertinent part, asserted that it had the sole discretion to elect whether to repair or replace the vehicle and that it was only obligated to provide the insured with a comparably functioning vehicle. *Id. at 1223-1224*.

(n79)Footnote 79. *Id. at 1224*.

(n80)Footnote 80. *Id.*

(n81)Footnote 81. *Id. at 1225*.

(n82)Footnote 82. *Id.*

(n83)Footnote 83. *Id.*

(n84)Footnote 84. *Id.*

(n85)Footnote 85. *556 S.E.2d 114 (Ga. 2001)*. The policy language at issue in *Mabry* included (1) State Farm's promise to "pay for loss to your car minus any deductible"; (2) a provision limiting State Farm's liability to the lower of the actual cash value of the vehicle or the cost of repair or replacement; and (3) a provision giving State Farm the right to settle a loss by paying up to the actual cash value of the car or repaying "to repair or replace the property or part with like kind and quality". *Id. at 118*. State Farm contended that, when it elects to repair a vehicle, its only obligation under the policy is to pay to repair the vehicle to its pre-loss condition. The insureds, on the other hand, posited that the policy required the insurer to compensate them for their entire loss, to make them whole, which includes cost of repairs and any diminution in value. *Id. at 119*.

(n86)Footnote 86. *Id. at 122*.

(n87)Footnote 87. *Id.*

(n88)Footnote 88. *134 S.E. 336 (Ga. Ct. App. 1926)*.

(n89)Footnote 89. *Id. at 120* (quoting *U.S. Fid. & Guar. Co. v. Corbett, 134 S.E. 336 (Ga. Ct. App. 1926)*).

(n90)Footnote 90. *143 S.E.2d 55 (Ga. Ct. App. 1965)*.

(n91)Footnote 91. *Mabry, 556 S.E.2d at 120*.

(n92)Footnote 92. *167 S.E.2d 610 (Ga. Ct. App. 1969)*.

(n93)Footnote 93. *199 S.E.2d 273 (Ga. Ct. App. 1973)*.

(n94)Footnote 94. *Mabry, 556 S.E.2d at 120*.

(n95)Footnote 95. *Mabry, 556 S.E.2d at 120-121*.

(n96)Footnote 96. *Id. at 121*.

(n97)Footnote 97. *Id. at 122*.

(n98)Footnote 98. *Id.* (emphasis added).

(n99)Footnote 99. *E.g., Hyden v. Farmers Ins. Exch., 20 P.3d 1222,1225 (Colo. Ct. App. 2000)*; *Delledonne v. State Farm Mut. Auto. Ins. Co., 621 A.2d 350 (Del. Super. Ct. 1992)* (holding similar policy language to be ambiguous in a case involving flood damage), *overruled by O'Brien v. Progressive N. Ins. Co., 785 A.2d 281 (Del. 2001)*; Cazabat v. Metropolitan Prop. & Cas. Ins. Co., No. CAKC99-0544, *2000 R.I. Super. LEXIS 110 (R.I. Super. Ct. April 24, 2000)*.

(n100)Footnote 100. *Hyden, 20 P.3d at 1225*.

(n101)Footnote 101. *Id.*

(n102)Footnote 102. *Id.*

(n103)Footnote 103. The court determined that Louisiana law was applicable to one plaintiff's claim, while Rhode Island law applied to the other plaintiff's claim. *2000 R.I. Super. LEXIS 110 at *11*.

(n104)Footnote 104. No. CAKC99-0544, *2000 R.I. Super. LEXIS 110 (R.I. Super. Ct. April 24, 2000)* (unpublished opinion by a trial court of general jurisdiction).

(n105)Footnote 105. *Id. at *17-18* .

(n106)Footnote 106. *Id.*

(n107)Footnote 107. *Id. at *18* .

(n108)Footnote 108. *Id. at *18-19* .

(n109)Footnote 109. *Id. at *19-20* .

(n110)Footnote 110. *See Campbell v. Markel American Ins. Co., 822 So. 2d 617, 627 (La. Ct. App. 2001)* ("[W]e are convinced that the better view of the 'repair or replace' limitation is that it caps [the insurer's] liability at the cost of returning the damaged cycle to substantially the same physical, mechanical, and cosmetic condition as existed before the loss. There is no concept of 'value' in the ordinary meaning of the word 'repair.' "); *Johnson v. Illinois Nat'l Ins. Co., 818 So. 2d 100, 104 (La. Ct. App. 2001)* ("We agree with those cases wherein it has been found that the 'like kind and quality' language is unambiguous and does not provide coverage for diminished value claims.").

(n111)Footnote 111. *229 P.3d 857 (Wash. Ct. App. 2010)* .

(n112)Footnote 112. *Id. at 861* .

(n113)Footnote 113. *Id. at 862* .

(n114)Footnote 114. *Id.* Following the insured's accident, his insurer repaired his vehicle, but did not compensate the insured for diminished value. The insured filed a complaint alleging that the insurer's failure to restore his vehicle to its pre-loss condition through payment of the difference in the value between the vehicle's pre-loss value and its value after it was damaged, properly repaired and returned. *Id. at 859-860* .

(n115)Footnote 115. The limitation of liability clause provided that the insurer's liability for loss "shall not exceed: 1. The amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation." *Id. at 860.* The coverage clause required the insurer to "pay for loss to your Insured car caused by collision less any applicable deductibles." The policy set for the following definitions: (1) loss is "direct and accidental loss of or damage to your Insured car, including its equipment"; (2) accident means a sudden event resulting in property damage neither expected nor intended by the Insured person; (3) property damage is physical injury to or destruction of tangible property, including loss of its use. *Id. at 862-863* .

(n116)Footnote 116. *Id. at 863* .

(n117)Footnote 117. "Like" is defined as the same as or similar to; "kind" refers to fundamental nature; and "quality" is a degree of excellence, grade, caliber. *Id. at 863* .

(n118)Footnote 118. *Id.*

(n119)Footnote 119. *Id.*

(n120)Footnote 120. *Id.*

(n121)Footnote 121. *196 P.3d 1 (Or. 2008)* .

(n122)Footnote 122. *Id. at 2-3* . The policy required the insurer to "pay for loss to [the] insured car caused by collision less any applicable deductibles." *Id. at 3* . Loss is defined as "direct and accidental loss of or damage to [the] insured car, including its equipment." The Limits of Liability provision, however, limited insurers' liability as follows: "Our limits of liability for loss shall not exceed: 1. the amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality; or with new property less an adjustment for physical deterioration and/or depreciation." *Id.* The policy also set forth that the insurer would "pay the loss in money or repair or replace damaged or stolen property." *Id.*

(n123)Footnote 123. *Id. at 3-5* .

(n124)Footnote 124. *114 P.2d 1005 (Or. 1941)* . The *Gonzales* court stated that, "[u]nder *Dunmire*, 'repair' encompasses the restoration of the vehicle to its condition prior to the collision." *196 P.3d at 6* . In *Dunmire*, the court upheld the trial court's award of diminution in value in addition to the cost of repairs. *114 P.2d at 1008-1009* .

(n125)Footnote 125. *291 P. 498 (Or. 1930)* . Although the *Rossier* court did not define "repair", the *Rossier* court did determine that "if repairs to a vehicle do not restore the vehicle to its pre-accident condition, then the correct measure of damages is the difference between the fair cash value of the automobile before and after the collision." *Gonzales, 196 P.3d at 5.*

(n126)Footnote 126. *Gonzales, 196 P.3d at 7.*

(n127)Footnote 127. *Gonzales, 196 P.3d at 6-7*; *see also Potomac Ins. Co. v. Wilkinson, 57 So. 2d 158, 160-161 (Miss. 1952)* ("If such repairs can restore also its market value as of the date of the damage, such cost of repair is the measure of liability. If, despite such repairs, there yet remains a loss in actual market value, estimated as of the collision date, such deficiency is to be added to the cost of the repairs. It is not the value to the owner which controls, but the value to those who constitute the market in used cars."); *but see Blakely v. State Farm Mut. Auto. Ins. Co., 406 F.3d 747, 752-753 (5th Cir. 2005)* (distinguishing *Wilkinson* and concluding that the policy described three ways that a loss can be settled: " 'cost of repair or replacement" could be based upon either the cost of repair or replacement agreed upon by the insured and State Farm, a competitive bid approved by State Farm, or a written estimate based upon the prevailing price. There is no mention of additional recovery for any loss in, or diminished, value; nor can any policy text be understood in its "plain, ordinary, and popular sense," to mean such diminished value is recoverable").

(n128)Footnote 128. *See American Manufacturers Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 162 (Tex. 2003)* .

(n129)Footnote 129. *Id.*

(n130)Footnote 130. *Gonzales v. Farmers Ins. Co. of Oregon, 196 P.3d 1, 7 (Or. 2008)* .

(n131)Footnote 131. Plaintiffs' affidavit and two expert affidavits showed that plaintiff was dissatisfied that his vehicle had been repaired with like kind and quality parts and was not restored to its pre-loss condition; and describing the inability of the body shops to restore the vehicle to its pre-loss physical condition. *Id.*

(n132)Footnote 132. *Id.*

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Scope

This chart addresses the manner in which courts have addressed coverage for diminution in value in addition to repair costs under an insurance contract covering (1) real property and/or (2) personal automobiles. "YES" indicates rulings where courts have determined that an insurance contract includes coverage for diminution in value in addition to repair costs; and "NO" indicates rulings where courts have been unwilling to find that an insurance contract includes coverage for post-repair diminution in value. "INCONCLUSIVE" indicates decisions where the opinion is unclear on the issue of post-repair diminution in value or where the court opted not to decide the issue of post-repair diminution in value. Of note, this survey is limited to first-party disputes, rather than third-party liability claims. Additionally, cases involving uninsured or underinsured motor coverage or cases involving defective workmanship are not included in this survey.

This survey is not intended to be, and does not constitute legal advice as to a particular case or claim. The survey provides an overview, but is not an exhaustive list of all cases. While the survey does contain brief summaries of the case, each case presents a unique factual and legal scenario. Coverage determinations should be made by the claims professional based upon the analysis of the relevant policy language, review of relevant claim-specific facts, and a detailed and specific review and application of each individual case and controlling law.

State	**Does the State Allow Insured to Recover for post-repair diminution in value under an insurance contract covering (1) Real Property or (2) Automobiles?**
Alabama	**Automobile:** NO. *Pritchett v. State Farm Automobile Insurance Company*, 834 So. 2d 785 (Ala. Civ. App. 2002) (*cert. denied*) ("... the most appropriate interpretation of 'the repair and damaged property or part, or replace the property or part' provision requires that State Farm return the damaged automobile to substantially the same physical and operating condition as it occupied before the collision that caused the damage but that, under the unambiguous language of the insured policy, State Farm is not required to restore the automobile's value"). NO. *Kanellis v. Pacific Indem. Co.*, 917 So. 2d 149 (Ala. Civ. App. 2005) (affirming summary judgment in favor of the insurer where the insured failed to present a supplemental inventory of needed parts or repairs, as required under the policy, or otherwise inform the insurer that further re-

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	pairs were needed in order to " 'return [it] to substantially the same physical and operating condition as it occupied before the collision that caused the damage' ").
Arizona	**Automobile:** NO. *Johnson v. State Farm Mut. Auto. Ins. Co.*, 754 P.2d 330 (Ariz. Ct. App. 1988) (concluding that the insurer's liability is unambiguously limited by the terms of the policy to the cost of repairing the vehicle less any deductible payable by the insured; therefore, the insurer was not required to also pay for the difference in the value of the vehicle before and after the collision).
California	**Automobile:** NO. *Ray v. Famers Ins. Exchange*, 200 Cal. App. 3d 1411, 1488 (1988) (determining that the policy unambiguously gave the insurer the right to elect to repair if the cost to repair to like kind and quality was less than the actual cash value of the vehicle at the time of loss; therefore, "[t]o the extent [the insured's] automobile was repaired to its pre-accident safe, mechanical, and cosmetic condition, [the insurer's] obligation under the policy of insurance to repair to 'like kind and quality' was discharged.").
Colorado	**Automobile:** YES. *Hyden v. Farmers Insurance Exchange*, 20 P.3d 1222 (Colo. Ct. App. 2000) ("[W]e hold that when an automobile insurer promises to provide an insured with a vehicle 'of like kind and quality', the insurer must provide the insured, through repair, replacement, and/or compensation, the means of acquiring a vehicle substantially similar in function *and value* to that which the insured had prior to his or her accident.") (emphasis added).
Delaware	**Automobile:** NO. *O'Brien v. Progressive Northern Insurance Company*, 785 A.2d 281 (Del. 2001) (concluding that the policy language 'repair and replace' was not ambiguous and does not contemplate payment of diminution of value).
Florida	**Automobile:** NO. *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732 (Fla. 2002) (holding that the payment of loss and limit of liability provisions clearly provide the insurer with the option to either reimburse the insured through a monetary payment or pay to repair or replace the automobile; and, if the insurer elects to repair, "the insurer's liability was limited to the monetary amount necessary to repair the car's function and appearance, commensurate with the condition of the auto prior to the loss").
Georgia	**Real Property:** YES. *NUCO Invs., Inc. v. Hartford Fire Ins. Co.*, No. 1:02 CV 1622 CAP, 2005 U.S. Dist. LEXIS 33350 (N.D. Ga. Dec. 5, 2005) (holding that when a policy undertakes to pay the insured for a loss, the insurer is required to restore the insured to its position in terms of pre-loss value). NO. *Royal Capital Development, LLC v. Maryland Cas. Co.*, No. 1:10-CV-1275-RLV, 2010 U.S. Dist. LEXIS 133911 (N.D. Ga. Dec. 2, 2010) ("The plain language of the policy does not cover [diminution in value] damages since the defendant selected 'option b' contained in the 'Loss Payment' clause, which provided only for 'the cost of repairing or replacing the lost or damaged property.' "). **Automobile:** YES. *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114 (Ga. 2001) (analyzing and relying on 75 years of Georgia precedence, the Georgia Supreme Court held that "the insurance policy, drafted by the insurer,

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	promises to pay for the insured's loss; what is lost when physical damage occurs is both utility and value; therefore, the insurer's obligation to pay for the loss includes paying for any lost value").
Hawaii	**Real Property:** NO.*Park v. Transamerica Insurance Company*, 917 F. Supp. 731, 733 n.3. (D. Haw. 1996) ("... if the cost of repairs measure is used to calculate damages, [the insurer] cannot, by any stretch of the policy, be required to pay for the diminution in value of the house *in addition to* the cost of repairs.").
Illinois	**Automobile:** NO. *Sims v. Allstate Ins. Co.*, 851 N.E.2d 701 (Ill. App. Ct. 2006) (concluding that the by definition "repair" and "replace" mean "to restore something to its former condition, not to its former value").
Indiana	**Automobile:** NO. *Allgood v. Meridian Security Insurance Company*, 836 N.E.2d 243 (Ind. 2005) (finding that under the terms and conditions of the automobile insurance policy, the insurer promised to repair the vehicle or to replace it with property of like kind and quality, but there was no promise to restore the value of the vehicle).
Kansas	**Automobile:** YES. *Venable v. Import Volkswagen, Inc.*, 519 P.2d 667 (Kan. 1974) ("When an insurer makes an election to repair or rebuild under a 'repair, restore or replace clause' in its policy the insurer is then obligated to put the vehicle in substantially the same condition as it was prior to the collision so as to render it as *valuable* and as serviceable as before.") (emphasis added). YES. *Boyd Motors, Inc. v. Employers Insurance*, 880 F.2d 270 (10th Cir. 1989) (applying Kansas law and interpreting a commercial inland marine policy as opposed to an automobile liability policy) ("We agree with the district court's conclusion that, pursuant to [the insurer's] promise to 'repair or replace the [damaged property] with material of like kind and quality,' the general coverage of the policy extended not only to the cost of repairs but also to the diminution in value of the repaired vehicles.").
Kentucky	**Automobile:** NO. *General Accident Fire & Life Assurance Corp. v. Judd*, 400 S.W.2d 685, 687 (Ky. Ct. App. 1966) ("It may be true ... that a car that has been wrecked can never be fully restored to its market value before the accident, but the insurance contract does not require a restoration of value; it requires only a restoration of physical condition.").
Louisiana	**Automobile:** NO. *Campbell v. Markel Am. Ins. Co.*, 822 So. 2d 617, 627 (La. Ct. App. 2001) ("[T]he better view of the 'repair or replace' limitation is that it caps [the insurer's] liability at the cost of returning the damaged [vehicle] to substantially the same physical, mechanical, and cosmetic condition as existed before the loss. There is no concept of 'value' in the ordinary meaning of the word 'repair.' To ascribe to the words 'repair or replace' an obligation to compensate the insured for things that, by their very nature, cannot be 'repaired' or 'replaced' would violate the most fundamental rules of contract construction."). NO. *Johnson v. Illinois Nat'l Ins. Co.*, 818 So. 2d 100, 104 (La. Ct. App. 2001) ("We agree with those cases wherein it has been found that the "like kind and quality" language is unambiguous and does not provide coverage for diminished value claims ... . The fact that a damaged, but adequately

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	repaired, vehicle may realistically have a lesser value in the market place has nothing to do with the "quality" of the repair itself.").
Maine	**Automobile:** NO. *Hall v. Acadia Ins. Co.*, 801 A.2d 993 (Me. 2002) ("The necessary cost of a repair is fairly understood to mean the amount that will be required to fix the car, not, in addition, the difference between the amounts a hypothetical willing and able buyer might pay to purchase the vehicle in its pre-accident condition versus its post-repair condition").
Massachusetts	**Automobile:** NO. *Given v. Commerce Ins. Co.* 796 N.E.2d 1275 (2003) (holding that insureds are not entitled to recover for alleged inherent diminished value under the automobile liability policy). NO. *Roth v. Amica Ins. Co.*, 796 N.E.2d 1281 (Mass. 2003) (affirming summary judgment in favor of the insurer dismissing the insured's claim for inherent diminished value to her automobile).
Michigan	**Automobile:** NO. *Carter v. State Farm Mut. Auto. Ins. Co.*, 87 N.W.2d 105 (Mich. 1957) (rejecting the notion that "the difference in value before the accident and the value at the time of the appraisal was the proper measure of damages"; instead, applied the policy's limit of liability provision, which limited the insurer's liability to the cost of repairs). NO. *Driscoll v. State Farm Mut. Auto. Ins. Co.*, 227 F. Supp. 2d 696 (E.D. Mich. 2002) (applying Michigan law) (determining that the automobile policies do not require payment for diminution in value as the language of the policies expressly unambiguously limit coverage to the *lesser* of the actual value or the cost of repair).
Minnesota	**Real Property:** INCONCLUSIVE. *Estes v. State Farm Fire and Cas. Co.*, 358 N.W.2d 123, 124 (Minn. Ct. App. 1984) (remand) (the loss settlement provision clearly and unambiguously limits the insurer's to the lesser of three alternatives: "the limit of liability, the replacement cost for equivalent construction and use, or the amount actually spent to repair the damage"; however, the question of whether the loss settlement provision in the policy allows for recovery for diminution in value was not properly before the court as it was not addressed at the trial court level). YES. *Hatch v. American Mut. Ins. Co.*, No. MC 99-3907 (Minn. Dist. Ct. 4th Jud. Dist. Oct. 12, 2000) ("Defendant's practice and policy of limiting the amount paid to settle claims under the replacement value provisions of its homeowner's policies to the cost to repair only the damaged areas, when the repairs result in mismatches in materials because of the unavailability of matching materials, violates the requirement under Minn. Stat. § 7A.20, Subd. 5(8) (1988) that replacement materials be of 'like kind and quality' and is contrary to its own policy provisions agreeing to replace damaged areas with materials of 'like construction for similar use.' "). **Automobile:** YES. *Ciresi v. Globe & Rutgers Fire Ins. Co.*, 244 N.W. 688 (Minn. 1932) (finding that the policy, which covered "loss or damage ... with proper deduction for depreciation however caused", included $600 in diminished value the vehicle sustained post-repairs). YES. *Carolla v. American Family Mut. Ins. Co.*, No. 19-C4-00-8633 (Minn. Dist. Ct. 1st Jud. Dist. June 29, 2001) (holding that "loss" as used in the automobile liability policy included coverage of diminished value be-

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	cause the insurer failed to define "loss" in the policy and because the insurer failed to exclude diminished value from coverage).
Mississippi	**Automobile:** YES. *Potomac Ins. Co. v. Wilkinson*, 57 So. 2d 158 (Miss. 1952) ("If such repairs can restore also its market value as of the date of the damage, such cost of repair is the measure of liability. If, despite such repairs, there yet remains a loss in actual market value, estimated as of the collision date, such deficiency is to be added to the cost of the repairs. It is not the value to the owner which controls, but the value to those who constitute the market in used cars."). NO. *Blakely v. State Farm Mut. Auto. Ins. Co.*, 406 F.3d 747 (5th Cir. 2005) (distinguishing *Wilkinson* and concluding that the policy described three ways that a loss can be settled: "cost of repair or replacement" could be based upon either the cost of repair or replacement agreed upon by the insured and insurer; a competitive bid approved by insurer; or a written estimate based upon the prevailing price. "There is no mention of additional recovery for any loss in, or diminished, value; nor can any policy text be understood in its 'plain, ordinary, and popular sense,' to mean such diminished value is recoverable"). NO. *Boston Ins. Co. v. Wade*, 35 So.2d 523 (Miss. 1948) (the insured's recovery should have been limited under the express provisions of the policy to what it would have cost to repair it where the policy limited the insurer's liability to the "actual cash value of the automobile, or if the loss is of a part thereof, the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality").
Missouri	**Automobile:** NO. *Lupo v. Shelter Ins. Co.*, 70 S.W.3d 16 (Mo. Ct. App. 2002) (holding that, based on the policy language, diminished value is not a covered loss as the insurer's liability is capped at either the actual cash value or the cost to repair or replace the automobile itself or with parts or property of like kind and quality).
New Mexico	**Automobile:** NO. *Davis v. Farmers Ins. Co. of Arizona*, 142 P.3d 17 (N.M. Ct. App. 2006) (ruling that while loss was incurred, the insurer was not liable for diminished market value since the policy, when read as a whole, does not include such coverage, as determined by the "Limits of Liability" and "Payment of Loss" sections of the policy).
New York	**Real Property:** INCONCLUSIVE. *Fusco v. State Farm Fire and Casualty Co.*, 57 A.D.3d 939 (N.Y. App. Div. 2008) (because the insureds' appraiser did not provide evidence of sale of properties that had oil leaks compared to properties that did not, the court determined that her opinion of diminution of value due to stigma was highly speculative and conclusory).
Ohio	**Automobile:** INCONCLUSIVE. *Nationwide Mutual Ins. Co. v. Shah*, 2004 Ohio 1291, 2004 Ohio App. LEXIS 1145 (Ohio Ct. App. 2004) ("As Nationwide had already paid for the property damage to the vehicle, it was not liable for the extraneous 'contract' damages arising from the Rental Agreement Contract.") Because the diminution in value claim was based on the Rental Agreement Contract and not the accident, it was not conclusively resolved that Ohio case law permits an insured to recover diminution in value in

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	addition to repair costs based on the terms of an automobile insurance contract.
Oregon	**Automobile:** YES. *Gonzales v. Farmers Inc. Co. of Oregon*, 196 P.3d 1 (Or. 2008) ("'[R]epair', as used in the policy at issue in this case, requires defendants to restore plaintiff's vehicle to its pre-loss physical condition. If defendants do not or cannot so restore plaintiff's vehicle, defendants must compensate plaintiff for the diminished value of the vehicle.").
Rhode Island	**Automobile:** YES. *Cazabat v. Metropolitan Property and Cas. Ins. Co.*, No. CAKC99-0544, 2000 R.I. Super. LEXIS 110 (R.I. Super. Ct. Kent April 24, 2000) (denying the insurer's motion for summary judgment because "an ambiguity exists as to whether or not 'the cost of repair or replace the property with other of like kind and quality' includes damages for the inherent diminished value of an automobile resulting from the vehicle being in an accident").
South Carolina	**Automobile:** NO. *Schulmeyer v. State Farm Fire and Casualty Company*, 579 S.E.2d 132, 135 (S.C. 2003) ("There is no concept of value in the ordinary meaning of" the words "repair" or "replace.").
South Dakota	**Automobile:** NO. *Culhane v. W. Nat'l Mut. Ins. Co.*, 704 N.W.2d 287, 295 (S.D. 2005) (refusing to allow recovery for diminished value after the full repair of a vehicle because "the ordinary meaning of the words 'repair' and 'replace' indicate [sic] something physical and tangible.").
Tennessee	**Automobile:** YES. *Senter v. Tennessee Farmers Mut. Ins. Co.*, 702 S.W.2d 175, 178 (Tenn. Ct. App. 1985) ("Each of the three factors--function, appearance, and value--must be substantially restored. If the repairs restore function and appearance but not fair market value, then the insured is entitled to recovery. We believe that the measure of recovery should be the difference in the fair market value of the property immediately before the accident and immediately after the accident assuming all repairs had been completed."). NO. *Black v. State Farm Mut. Automobile Ins. Co.*, 101 S.W.3d 427, 429 (Tenn. Ct. App. 2002) (distinguishing *Senter* and holding that the policy language was unambiguous and did not include payment for diminished value and specifically rejecting the contention that prior authority had established diminution of value as a doctrine to be applied by Tennessee courts to all motor vehicle policies).
Texas	**Automobile:** NO. *American Manufacturers Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 159 (Tex. 2003) ("We do not believe that the ordinary or generally accepted meaning of the word 'repair' connotes compensating for the market's perception that a damaged but fully and adequately repaired vehicle has an intrinsic value less than that of a never-damaged car.").
Virginia	**Automobile:** NO. *Bickel v. Nationwide Mut. Ins. Co.*, 143 S.E.2d 903, 906 (Va. 1965) (holding that the automobile insurance contract does not allow the insured to recover diminution in value in addition to the repair costs because "[t]o apply such measure of damages would be arbitrarily reading out of the policy the right of defendant to make repairs or replace the damaged part with materials of like kind and quality.").

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Washington	**Automobile:** YES. *Moeller v. Farmers Ins. Co. of Washington*, 229 P.3d 857 (Wash. Ct. App. 2010) (acknowledging that the policy covered diminished value as direct losses include those proximately caused by the initial harm, which included damage that remained that could not be repaired: "Even under [the insurer's] interpretation, the vehicle could not be restored to its pre-loss status because of the nature of the metal and stressed, but working, parts cannot be repaired").
Wisconsin	**Real Property:** NO. *Hawes v. Germantown Mutual Ins. Co.*, 309 N.W.2d 356 (Wis. Ct. App. 1981) (agreeing with the insurer that the "policy expressly limits recovery for loss to a covered building structure to the smallest of the replacement cost or cost of repair"; therefore, the court reduced the plaintiffs' judgment against the insurer by $5,000--the amount awarded for diminished market value). **Automobile:** NO. *Wildin v. American Family Mut. Ins. Co.*, 638 N.W.2d 87 (Wis. Ct. App. 2001) ("Since the policy plainly gives [the insurer] the right to elect the least expensive of the three options, it may choose to repair a vehicle even if all possible repairs do not restore the vehicle to its pre-collision market value").

CERTIFICATE OF SERVICE BY MAIL

I certify that on November 28, 2011, I caused copies of the foregoing **STATEMENT OF ADDITIONAL AUTHORITIES** to be sent via U.S. Mail, first class, postage prepaid, to the following counsel at the following addresses:

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